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In the Supreme Court of the United States.

October Term, 1990

COMMONWEALTH OF MASSACHUSETTS
SEACOAST ANTI POLLUTION LEAGUE,
NEW ENGLAND COALITION ON
NUCLEAR POLLUTION, TOWN OF HAMPTON
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, et al.
Respondents.

Petition for a Writ
of Certiorari to the United
States Court of Appeals
for the District of Columbia

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QUESTION PRESENTED

May the Nuclear Regulatory Commission ("NRC") issue a full power operating license for a nuclear power plant without deciding whether the applicable emergency plans will effectively protect the public in a radiological emergency?

PARTIES TO THE PROCEEDING

The Petitioners, Commonwealth of Massachusetts, Seacoast Anti Pollution League, New England Coalition on Nuclear Pollution and Town of Hampton participated as Intervenors in administrative proceedings before the Nuclear Regulatory Commission and its subsidiary boards, and as appellants before the Court of Appeals.[1/] Respondents, the United States Nuclear Regulatory Commission and the United States of America, were appellees in the Court of Appeals.

1/ The Town of Hampton participated as an Intervenor in the Court of Appeals.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 924 F.2d 311 (D.C. Cir. 1991). The opinions of the Nuclear Regulatory Commission are reported at 31 N.R.C. 197 (1990) and 31 N.R.C. 219 (1990). These three opinions are reprinted in full in the Appendices to this brief.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1991. This petition is being filed within 90 days of that judgment. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

REGULATION INVOLVED

10 C.F.R. § 50.47(a)(1).

Emergency Plans.

> (a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

STATEMENT OF THE CASE

A. Nature of the Controversy

Petitioners respectfully ask this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

Following the nuclear accident at Three Mile Island, the Nuclear Regulatory Commission ("NRC" or "Commission") adopted, in 1980, an emergency planning rule. As the Commission made clear in the rulemaking proceedings, this rule required the NRC to find, as a condition of licensing, that the emergency plans would be effective to protect the public. This finding was to be based upon the nature and extent of the risk at a particular site.

In 1982, the NRC confirmed this interpretation of the emergency planning rule. The Commission represented to the Court of Appeals and to Petitioners that the Seabrook reactor would not operate if the emergency plans were not effective to protect the public, based upon a site-specific review of the public risk.

In licensing the Seabrook plant in 1990, the NRC decided no longer to require a site-specific finding of effectiveness.

The Court of Appeals affirmed the Commission's decision that emergency plans need not actually protect the public in a radiological emergency, but rather need only comply with the 16 generic, non-site-specific standards set forth at 10 C.F.R. § 50.47(b).

As a result of the NRC's new interpretation of the emergency planning rule, any nuclear power plant in this country now may obtain an operating license without having effective emergency plans in place. Petitioners request this Court to grant certiorari, reverse the decision of the Court of Appeals, and order the NRC to consider the evidence proferred by Petitioners and excluded by the Commission from its licensing decision as described below.

B. Summary of Prior Proceedings

On March 1, 1990, the Commission affirmed the exclusion of Petitioners' testimony as irrelevant, that had been offered to show that the Seabrook emergency plans are not effective to protect the public, and that thousands of people would likely die or suffer

injury in the event of a radiological emergency. 31 NRC 197 (1990).

On the same day, the Commission allowed the license for the Seabrook nuclear power plant to become immediately effective and permitted the reactor to proceed to full power operation. 31 NRC 219 (1990).

Petitioners appealed these two decisions to the United States Court of Appeals for the District of Columbia pursuant to section 189 of the Atomic Energy Act, 28 U.S.C. §2342. Section 189 confers jurisdiction on the Court of Appeals to review final NRC orders regarding the grant of operating licenses.

On January 25, 1991, the Court of Appeals affirmed the decisions by the NRC.

REASONS FOR GRANTING THE PETITION

This Case Presents An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court

I. The Court Should Grant the Writ Because of the National Importance of the Public Safety Issues Implicated in the Nuclear Regulatory Commission's Interpretation of Emergency Planning Rule.

This Court should grant this petition because the NRC's new interpretation of the emergency planning rule is flatly inconsistent with the rule as originally promulgated in 1980, and places thousands of members of the public near the Seabrook site, and at any proposed site in this country, at substantial risk. Unless this Court reverses the new NRC interpretation of the rule, no agency or court will ever

determine whether, or to what extent, the emergency plans for Seabrook in particular, and for nuclear power plants in general, will protect the public in an emergency.

The Seabrook Site

The Seabrook nuclear power plant is located in a popular resort area on the New Hampshire seacoast, at the western edge of a tidal marsh, approximately two miles north of the Massachusetts border. 28 NRC 667, 779. Due to the influx of thousands of tourists and seasonal residents during the summer months, the population within the 10 mile Emergency Planning Zone ("EPZ") swells to about 250,000. More than 75,000 beachgoers may crowd the barrier beaches which begin less than 2 miles east of the reactor. See Id. at 802; App. Dir. Test. No. 7 ff Tr. 5622 at

38. There are only 5 access routes from these barrier beaches past the reactor to the mainland, and each is a two lane road. Id. at 779. This large "beach population" has access to very limited shelter, Id. at 775, consisting largely of summer cottages and fast food shops. For many serious accident scenarios for which the NRC itself has determined emergency planning to be necessary, a radioactive plume will reach the beaches before the beach population has time to evacuate.[2/]

2/ NRC/Federal Emergency Management Agency (FEMA) guidance estimates that the start of a major radioactive release, for those accidents within the NRC's planning spectrum, will occur within one half hour to several hours following the onset of accident conditions; and, after release, the radioactivity will travel 5 miles in 1.5 to 2 hours. NUREG 0654 FEMA-REP-1 Rev. 1 at 13, 17. Estimates of the evacuation times for the beach

(footnote continued)

Thousands of beachgoers on the barrier beaches would be trapped, with the reactor -- the source of the risk -- behind them and the ocean before them. According to one of the Seabrook utility's own experts, it would take six or more hours merely to move all the cars from one side of the beach to the other to reach the evacuation route. At that point many evacuees would still be on the barrier beaches, within sight of the reactor and scarcely farther from it than when they first attempted to escape six or more hours before.

Indeed, FEMA--the federal agency responsible for off-site emergency planning for nuclear power plants--has concluded:

(footnote continued)
population at Seabrook range from 7 to 11 hours.

> Therefore, using the standard guidance for the initiation and duration of radiological releases, and the current New Hampshire RERP [radiological emergency response plan] including ETE [evacuation time estimate], it appears that thousands of people could be unable to leave during an accident at Seabrook involving a major release of radioactivity without adequate shelter for as much as the entire duration of that release. Direct Testimony of Edward A. Thomas, Edward A. Tanzman, and Bruce J. Swiren on the New Hampshire Radiological Emergency Response Plan Presented on Behalf of the Federal Emergency Management Agency (September 11, 1987) at 38-39 ("FEMA prefiled testimony").

The Emergency Planning Rule

In response to the nuclear accident at Three Mile Island in 1979, Congress directed the NRC to promulgate emergency planning standards by rule and to require approved emergency plans. As a condition of licensing, these plans would be required to comply with the NRC's new emergency planning standards,

or to provide reasonable assurance that the public health and safety would not be endangered. 1980 Authorization Act, Public L. No. 96-295 §109(b)(1) ("Authorization Act"), App. Vol. II.*

This legislation grew out of Congress's conclusion, reached in light of the Three Mile Island accident, that the NRC had failed to provide for adequate public protection. As the House Committee on Government Operations Report of August 1979 stated:

> the Subcommittee's investigation revealed startling deficiencies in the state plans concurred in by the NRC. There thus is serious doubt whether the standards against which the NRC measures these plans are meaningful - doubt, in fact, whether NRC concurrence really means anything at all from a public health and safety standpoint. House Report No. 96-413, "Emergency Planning Around U.S. Nuclear Power Plants" 96th Cong. 1st Sess. (August 8, 1979) at 35.

* Citations are to attached appendices

The Report noted further:

> Apparently the Chairman and the other members of the Commission have subsequently disabused themselves of the notion that the NRC stamp of approval guarantees an effective plan ... One of the issues being considered in the newly initiated [NRC] rulemaking on emergency planning is "[w]hat constitutes an effective emergency plan for state and local agencies" 44 Fed. Reg. 41483 (July 17, 1979) . . . House Report at 38 n.99.3/

In January 1980, the NRC's own Special Inquiry Group on Three Mile Island released its report, the Rogovin Report. Sharply critical of the NRC's pre-Three Mile Island approach to emergency planning, this Report, too, urged adoption of emergency planning regulations as "an independent form of safeguard."

3/ This House Report was one of the bases for the Commission's December 1979 proposed emergency planning rule, 44 Fed. Reg. 75167, 75169, formally promulgated in 1980.

> [W]e believe that workable evacuation plans are a prerequisite to continued operation of existing and future reactors. Rogovin Report, volume I at 132.

Indeed, the NRC's own Special Inquiry Group recommended that:

> These plans must include sufficient detail to facilitate a reasonably prompt and effective 10-mile evacuation. Id. vol. II, part 3 at 1048.

On July 23, 1980, the NRC adopted emergency planning regulations (see 10 C.F.R. § 50.47(a)(1)) following lengthy discussion of the new regulatory standard for emergency plan approval.

The relevant standard provides:

> (N)o operating license for a nuclear power reactor will be issued unless a finding is made by the NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. 10 C.F.R. 50.47(a)(1). (emphasis added).

Much of the Commission discussion leading to adoption of the emergency

planning rule focused upon the proposal by Commissioner Bradford, ultimately unanimously adopted by the Commission, to substitute "adequate" in place of "appropriate" protective measures. While not seeking a guarantee of zero risk to the public, Commissioner Bradford explained that he wanted to ensure that no operating license would issue unless there were reasonable assurance that the emergency plans would be effective to protect the public in a radiological emergency:

> [W]hat we are doing here is setting the finding that is necessary for a license or for operation. . . If at that point in time you cannot make the finding that there are effective actions contemplated by the plan and that you have reasonable assurance of being able to do them . . . then I don't think the finding ought to be made. App. Vol III pp. 49-50.

Commissioner Gilinksy concurred:

> It seems to me that reasonable assurance of effective protection adds up to adequate protection. App. Vol. III p. 60.
>
> You want to be sure, reasonably sure that on the basis of this plan action will be taken that will keep people from getting irradiated to any substantial degree. App. Vol. p. 83.
>
> Commissioner Bradford: In other words, what we really want to do is have reasonable assurance that people aren't going to get irradiated to any unhappy degree. App. Vol. III p. 75.4/

Because the Commissioners recognized the importance of their rulemaking discussions to those concerned about a proper interpretation and application of the new requirement that emergency plans provide "adequate" protection, they took the unusual step of adopting the

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4/ The relevant section of the transcript addressing the emergency planning standard is included in the appendix to this petition. App. Vol. III.

transcript of their hearing as official.[5/]

As is clear from the transcript, in choosing the word "adequate" for its new regulation, the Commission meant to assure, based on a site-specific analysis, that no operating license would issue unless the emergency plans would actually be effective in protecting the public in a radiological emergency. In adopting this transcript as official, the Commission essentially added a definitional coda to its new

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5/ App. Vol. III p. 77. "I think we all agree that the weight that is in a single word is enormous, clearly . . . . If we choose adequate, just embedding the word "adequate" isn't going to even begin to describe what we meant by it. Whereas, if the transcript of the meeting underlay the decision that might be of help to some people who are trying to figure out what do we mean." App. Vol. III pp. 76-77.

regulation, making clear that "adequate protective measures" entailed a site-specific finding of effectiveness.

In 1982, in the Seabrook proceedings, the NRC confirmed that the new emergency planning rule required effective emergency plans, and stated that Seabrook would not receive an operating license if evacuation proved infeasible. SAPL v. NRC 690 F.2d 1025, 1030 (D.C. Cir. 1982). The NRC further stated that the feasibility of evacuation would be determined on a site-specific basis. Id. at 1032. Indeed, it was largely through these assurances that the NRC convinced the D.C. Circuit that construction of the Seabrook plant should not be halted due to the site-specific evacuation difficulties associated with the plant.

In 1987, following seven years of study, the Federal Emergency Management Agency ("FEMA") determined that the Seabrook emergency plans do not provide for a feasible evacuation and do not provide reasonable assurance of adequate protection to the public. FEMA prefiled testimony.

Because the NRC had failed to provide for adequate emergency planning, as made clear by the accident at Three Mile Island, the President had ordered that FEMA, not the NRC, act as the expert agency to review offsite emergency plans for nuclear power plants. Appropriately, as part of its 1980 rulemaking, the NRC gave FEMA findings on emergency plans a presumption of validity. 10 C.F.R. 50.47(a)(2). Acting in its role as an

expert, FEMA studied the Seabrook site and concluded that, because of the substantial risk to thousands of beachgoers, the emergency plans were not adequate to protect the public health and safety and Seabrook should not operate.

Thus confronted with the prospect that ineffective emergency plans might block licensing, the NRC--notwithstanding FEMA's expert status, and the presumptive validity accorded its findings under the NRC's own regulations--advised FEMA that there would be a "war" between the agencies if FEMA adhered to its view that the Seabrook plans were not adequate. Hearing Tr. 13027.

FEMA capitulated. After altering its position on the emergency planning

standard, it withdrew its initial testimony (quoted supra), and removed its lead witness from the Seabrook hearings. It has never, however, disavowed the facts establishing that the Seabrook emergency plans are not effective to protect the public in an emergency. Hearing Tr. 12875-78, 14060-61.

Like FEMA, Petitioner Commonwealth of Massachusetts, during administrative hearings on the Seabrook emergency plans, proffered expert testimony (the "Sholly/Beyea testimony") designed to demonstrate that the Seabrook emergency plans are not effective to protect the public. These experts asserted that thousands of people would be severely injured or killed in the event of a Seabrook radiological emergency because

evacuation times for large populations on the Seabrook beaches greatly exceed the warning times for a significant range of the accident categories identified by the NRC, and no adequate sheltering alternative is available to these beach populations.

On the same day it authorized Seabrook to proceed to full power, the NRC affirmed the exclusion of this testimony on the grounds that it was irrelevant, and that an emergency plan can be judged "adequate" without consideration of its effectiveness in protecting the public. The Commission defended the absence of any site-specific judgment of effectiveness with a new interpretation of the emergency planning rule which

eviscerated the rule's (and the NRC's) original intent.

For the first time, the Commission held that the "adequate protection" finding required by 10 C.F.R. § 50.47(a)(1) as a condition of licensing flows automatically from a finding that an emergency plan complies with the generic standards ("(b) standards") set forth at Section 50.47(b)(1)-(16).[6/] As a result, the

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6/ The (b) standards identify general requirements for an emergency plan, but do not establish, by themselves, any particular standard of effectiveness against which to measure compliance with these standards. For example, the generic requirement of (b)(10) for a "range of protective actions" for the public could be satisfied by a 24-hour evacuation or by sheltering in a plastic bag. Absent a judgment of effectiveness, compliance with the "(b) standards" does not provide reasonable assurance of any level of public protection.

NRC reasoned, the Sholly/Beyea testimony and the Petitioners' demand that the NRC assess the actual effectiveness of the Seabrook plans ignore the fact that "adequacy" now is legally established--at Seabrook as at every other site--not by a case-by-case assessment of the effectiveness of the emergency plans but by a best efforts compliance with generic planning standards. Site-specific risk to the public safety, no matter how great, is thus now irrelevant to licensing. This contradicts the position taken by the NRC both at its initial rulemaking proceeding in 1980 and before the D.C. Circuit, in this very proceeding, in 1982. See SAPL, supra, at 1032.

It is also important to note that the particular requirements at issue--the (b) standards set forth in Section 50.47--are taken almost verbatim from an NRC Guidance (NUREG-75/111) which dates back to 1974. This guidance identified 16 planning objectives and in virtually every instance the 1974 "objective" is functionally equivalent, and indeed sometimes identical, to the corresponding 1980 (b) standard. NUREG-75/111 at vi, 1-36. Thus, these were essentially the same standards in existence at the time of the Three Mile accident, and the same standards the House Committee on Government Operations Report had in mind when it expressed "serious doubt whether the standards against which the NRC measures these plans . . . mean[] anything at all from

a public health and safety standpoint." House Report at 35, supra.

The Commission's suggestion that the (b) standards were based on the 1980 rulemaking record, stemmed from a response to TMI or embodied its lessons in some fashion, reveals a stunning absence of institutional memory. In fact, the (b) standards, were never proposed, reviewed, or adopted as the benchmark for effective emergency planning.

In deferring to the NRC's new interpretation of the emergency planning rule, the Court of Appeals concluded that the NRC's present embrace of the generic (b) standards to determine plan adequacy was not "contradicted" by the rulemaking transcript. App. Vol. I. p. 76. The Commission in 1980, however,

did not decide that generic emergency planning could never be utilized in any form, because the subject was never discussed at all. Not a single Commissioner proposed or addressed generic planning as a means reasonably to assure effective plans or to satisfy the Congressional mandate that the NRC establish planning standards so that the public will not be endangered by plant operation. Significantly, the (b) standards, now exclusively relied on by the NRC to assure plan adequacy, were already part of the proposed rule when the Commissioners met in 1980 to discuss the need to assure effective planning. App. Vol. III pp. 102-109. Yet the Commissioners never mentioned them. In light of this, and the Commission's alternative and exclusive focus during

the rulemaking on a case by case assessment of effectiveness, it is clear that the Commission never intended that compliance with the generic (b) standards without some further judgment of effectiveness would be sufficient to provide the adequate protective measures mandated by section (a)(1).

Nevertheless, the Court of Appeals held that the Commission's new interpretation of the emergency planning rule was lawful and did not require a case by case effectiveness assessment. App. Vol. I p. 58. The Court deferred to the NRC's new interpretation, issued by adjudication, which now allows a full power license to issue if an applicant's compliance with the NRC's generic planning standards is merely "more than pro forma." App. Vol. I p 87.

According to the Court, the NRC may find that the generic standards have been satisfied if planners have "given careful and adequate consideration" to planning strategies that can be implemented to best satisfy the planning standards, App. Vol. p. 81, regardless of the effectiveness of these strategies to protect the public.

Therefore, although nominally requiring "more than pro forma" compliance with the generic (b) standards, App. Vol. I p. 80, the Court of Appeals approved a new rule interpretation that fundamentally contradicts the intent of the 1980 rulemaking. In effect, the Court permitted the NRC, in an adjudicatory context, to repeal the 1980 rule and to articulate and apply a new rule. The

Court thus granted great deference to the NRC to eliminate effective plans as a condition of licensing and to disregard the site-specific risk at Seabrook.

II. Under the Proper Interpretation the Ruling of the Court Below and the Nuclear Regulatory Commission's Decision to Issue a Full Power Operating License Can Not Stand

It is fundamental that an agency must obey its own rules. Arizona Grocery v. Atchison Ry. 284 U.S. 370 (1932). Having acted in 1980 in its rulemaking capacity to require effective emergency plans as a condition of licensing, the NRC, when acting in its adjudicatory role in 1990, was "bound to recognize the validity of the rule of conduct prescribed by it and not to repeal its own enactment with

restrospective effect." Id. at 389.[7/]

The rulemaking transcript makes abundantly clear--and the NRC in SAPL confirmed--that "adequate" protection under section (a)(1) requires a site-specific assessment of effectiveness. The NRC never performed this assessment for Seabrook. App. Vol. I p. 75.

7/ The Court of Appeals notes the NRC's suggestion that Petitioners could have applied for a waiver of the new generic rule "requesting more stringent planning requirements for Seabrook." Id. at 330. After more than a decade of litigation, Petitioners instead seek to have the emergency planning rule applied -- to assure effective plans -- as it was intended when the rule was adopted in 1980. Also, Petitioners could not have sought a waiver of a rule they did not know existed; the NRC announced its new interpretation of the emergency planning rule on the very day it authorized Seabrook to proceed to full power operation.

In affirming the NRC's licensing decision, the Court of Appeals therefore gave undeserved deference to the Commission's new interpretation of the emergency planning rule. INS v. Cardoza-Fonseca, 480 U.S. 421, 446 n. 30 (1987) (agency interpretation that conflicts with earlier interpretations is "entitled to considerably less deference"); See also Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977) (degree of deference to agency interpretation of regulation varies according to such factors as timing and consistency).

To license Seabrook, the NRC literally changed the rules of the game at the last minute. Under the NRC's generic (b) standards no level of public risk is too great to prevent licensing,

nor is it even relevant to the licensing proceeding. The new position of the NRC cannot be allowed to stand. Public safety is too important.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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